Volume 39 | Issue 4 Article 4

June 1933

Bulk Sales Laws: Transactions Covered by These Statutes

Thomas Clifford Billig
West Virginia University College of Law

Kingsley Richard Smith
West Virginia University College of Law

BULK SALES LAWS: TRANSACTIONS COVERED BY THESE STATUTES

THOMAS CLIFFORD BILLIG*
KINGSLEY RICHARD SMITH**

This paper will carry forward the discussion of bulk sales legislation begun in an article entitled "Bulk Sales Laws: A Study in Economic Adjustment",[1] and continued in a second article entitled "Bulk Sales Laws: A Study in Statutory Interpretation."[2] The first paper "considered three phases of the bulk sales problem: (1) the inability of the American statutory successors of 13 Elizabeth to meet the legal needs of the creditor class when a defrauding merchant sold out in bulk his stock of unpaid for goods to a *bona fide* purchaser for value; (2) the campaign waged by the National Association of Credit Men to place bulk sales laws on the statute books of the forty-eight states; (3) the unfavorable attitude of at least five state supreme courts toward bulk sales laws which resulted (a) in these statutes being declared unconstitutional in the states in question and (b) in certain changes being made in the unconstitutional statutes in order to meet the objections raised by the courts."

The second paper was devoted to a consideration of the operation of these bulk sales laws after they were on the statute books of the several states.[3] The reactions of several outstanding credit men toward bulk sales laws were noted. Then the attitude of the courts in interpreting these statutes was treated in the following aspects: (1) who are creditors within the meaning of bulk sales laws; (2) who are sellers; (3) to what kinds of property do the bulk sales laws apply?

This article will consider the attitude of the courts toward the general problem of what types of business transactions are covered by these bulk sales laws. The general problem will be broken down into three specific problems: (1) does a chattel mortgage of "goods, wares and merchandise," and perhaps of store fixtures also, fall within the provisions of a bulk sales statute; (2) does the statute cover a general assignment for the benefit of

* Associate Professor of Law, West Virginia University.
** Secretary of the Student Board of the West Virginia Law Quarterly.
[1] (1928) 77 U. PA. L. REV. 72.
[2] (1932) 38 W. VA. L. Q. 309.
[3] A list of these statutes appears in (1932) 38 W. VA. L. Q. 309, 310, n. 3.

creditors; (3) must the bulk sales law be complied with where the stock, and perhaps fixtures, of a business have been transferred to a corporation or to a partnership organized to take over the business?

Since this third paper, like the second of the series, is to appear in the West Virginia Law Quarterly, it may be well to analyze these problems (partially at least) in the light of the West Virginia Bulk Sales Law.[4] This statute, which is typical of those enactments that follow the New York form,[5] reads as follows:[6]

> "Sec. 1. When Sale in Bulk of Merchandise or Fixtures Fraudulent and Void.—The sale in bulk of any part, or the whole, of a stock of goods, wares and merchandise and / or fixtures, pertaining to the conducting of the seller's business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall, at least fifteen days before the sale, make a full detailed inventory, showing the quantity, and so far as possible with the exercise of reasonable diligence, the cost price to the seller, of each article to be included in the sale and the price to be paid therefor; and unless the purchaser demand and receive from the seller a written list of the names and addresses of the creditors of the seller, with the amount of indebtedness due or owing to each, certified by the seller under oath to be a full, accurate and complete list of his creditors, and of his indebtedness, or a statement certified by the seller under oath that he has no creditors; and unless the purchaser shall, at least fifteen days before taking possession of such goods, wares and merchandise and / or fixtures, or paying therefor or giving some note or other evidence of indebtedness therefor, notify personally or by registered mail every creditor whose name and address is stated in such list, or of which he has knowledge, of the proposed sale and stating the aggregate value of the goods, wares and merchandise and / or fixtures, proposed to be sold, as shown by such inventory, and the price, terms and conditions of such sale".[7]

---

[4] W. VA. REV. CODE (1931) c. 40, art. 2, §§ 1-6.

[5] See CREDIT MANUAL OF COMMERCIAL LAWS (1933) 326.

[6] For the history of the West Virginia statute, see Billig and Smith, *op. cit. supra* n. 2, at 313.

[7] The Reviser's Note explains that "this section comprises that portion of § 3a, c. 74, Code 1923, which constituted the whole of § 1, c. 78, Acts 1909 . . . . "The words 'or a statement certified by the seller under oath that he has no creditors' are new, also the words 'or giving some note or other evidence of indebtedness therefor,' taken from § 5187, Code Va. 1919. The concluding portion of the section beginning with the words 'and stating the aggregate value,' adopted substantially from § 5187 Code Va. 1919, is new."

Section 2 of article 2 provides that if the inventory or the list of creditors

General Considerations

First of all, what general considerations assist the courts in determining those business transactions which fall within the provision "otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller?" This phrase, lifted from the West Virginia statute, is typical of that found in many bulk sales laws.[8] In interpreting it the courts generally adopt the test of whether the merchant made the sale in the manner usually employed in such a business or whether he used some peculiar method of transfer with a view to converting the proceeds of the sale to his own use.[9] Subject, of course, to the language of the statute in question, the conveyance must be a sale, transfer,

---

furnished by the seller or the notice given by the buyer to the creditors "shall in any respect be false or incomplete" with respect to the matters required by section 1, then "such sale shall prima facie be presumed to be fraudulent and void as against the creditors of such seller, and the burden shall be upon the purchaser to show that he acted in good faith and without any knowledge of such falsity or incompleteness." This section appeared for the first time in the Revised Code of 1931.

Section 3 provides that if the sale is invalid because of failure to comply with the statute then "the goods, wares and merchandise and/or fixtures, in the hands of the purchasers . . . . shall be liable to such creditors." If the purchaser disposed of the goods then he shall be liable to the creditors in an action at law for the value of the goods.

Section 4 requires the seller and the purchaser to preserve the inventory list for six months. After the expiration of that period no suit can be brought attacking the sale.

Section 5 declares that "sellers and purchasers . . . . shall include corporations, associations, copartnerships and individuals, but nothing contained in this article shall apply to sales by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any one acting under judicial process."

Section 6 sets out the form of notice which the purchaser is required to furnish the seller's creditors.

[8] See, for example, N. Y. CONS. LAWS (Cahill, 1923) c. 42, § 44; OHIO GEN. CODE (Page, 1926) §§ 11, 102-11, 103-1; VA. CODE (Michie, 1930) § 5187.

[9] Hart v. Brierly, 189 Mass. 598, 76 N. E. 286 (1905). In that case the court, per Braley, J., said (p. 601): "Where a going mercantile business is so conducted that to be profitable large quantities of goods must be sold to different customers, even to the extent of exhausting the entire stock which may be on hand at any stated time, such a sale is not voidable although all the stock in the seller's possession at the time may be delivered to a single buyer. The statutory test is whether the sale was made in the usual way in which a merchant owing debts conducts his business, or whether he takes an unusual method of disposing of his property in order to get the money for his own use, leaving his creditors unpaid. The inquiry is essentially an issue of fact depending upon the nature of the seller's business, his ordinary method of making sales, and his indebtedness. A sale of his entire stock by one trader might not be uncommon, while such a sale if made by another would be extraordinary and within the statute."

or assignment[10] in bulk of the whole,[11] or a part[12] of property covered by the statute. And, as previously noted, the sale must be made in a manner otherwise than in the usual course of trade.[13]

Chattel Mortgages of Stocks and Fixtures

In order to determine with at least some degree of certainty the types of business transactions covered by bulk sales laws, it will be necessary to look at some of these transactions specifically. For instance, does the business transaction which results in a chattel mortgage rather than a sale fall within the purview of the statute? In other words, suppose that a shopkeeper mortgages his entire stock of goods, wares and merchandise — and perhaps fixtures — to X, instead of making a present outright sale. The mortgage usually is made either to secure an antecedent debt or to obtain a new loan. There is no compliance with the bulk sales law. Has the statute been violated? Sometimes the answer to this question is contained in the language of the statute itself. The bulk

[10] Gallus v. Elmer, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067 (1906); Humphrey v. Coquillard Wagon Works, 37 Okla. 714, 132 Pac. 899, 49 L. R. A. (N. S.) 600 (1913); William Tackaberry Co. v. German State Bank, 39 S. D. 185, 163 N. W. 709 (1917).

[11] Carpenter v. Karnow, 193 Fed. 762 (D. C. Mass. 1911) (three separate sales of goods, comprising less than the entire stock, held not to constitute a "bulk sale." The court said (p. 765): "I find no case in which the sale of less than an entire stock in trade has been so regarded"); Young v. Lemieux, 79 Conn. 434, 65 Atl. 436, 600, 20 L. R. A. (N. S,) 160, 2 Ann. Cas. 452 (1906) aff'd. 211 U. S. 489, 29 S. Ct. 174 (1909) (the sale of a drug store by one conducting it separately from a general store he owned was held to be within the statute).

[12] Fiske Rubber Co. v. Hayes 131 Ark. 248, 199 S. W. 96 (1917) (a "material portion" of the seller's stock must be sold before the statute applies); Fawver v. Flesher, 208 Ill. App. 21 (1917) (the "major part" of a stock of merchandise must be sold to come within the statute); Armfield v. Saleeby, 178 N. C. 289, 100 S. E. 611 (1919) (a "large part" of a stock of merchandise is the requirement of some statutes, — ten per cent held not a "large part"); Mahoney-Jones Co. v. Sams Bros., 128 Tenn. 207, 159 S. W. 1094 (1913) (sale of half of a stock of goods held within the statute); B. F. Avery & Sons v. Waples, 19 Tex. Civ. App. 672, 49 S. W. 151 (1898).

[13] Fiske Rubber Co. v. Hayes, *supra* n. 12; G. S. Johnson Co. v. Beloosky, 263 Ill. 363, 105 N. E. 287 (1914); Hart v. Brierly, *supra* n. 9 (executory contract for sale by insolvent bakery of all bread on hand and for all to be made in following three months held not within statute); Squire & Co. v. Teller, 185 Mass. 18, 69 N. E. 312, 102 A. S. R. 322 (1904); Riley Pennsylvania Oil Co. v. Symonds, 195 Mo. App. 11, 190 S. W. 1038 (1916); Schwartz v. King Realty, *etc.*, Co., 14 N. J. L. 134, 109 Atl. 567 (1920); Pritz v. Jones, 107 App. Div. 643, 102 N. Y. Supp. 549 (1907); Wilson v. Edwards, 32 Pa. Super. Ct. 295 (1907); Krower v. Martin, 184 S. W. 511 (Tex. Civ. App. 1916) (sale by one withdrawing from jewelry business not within bulk sales law, the goods having been mortgaged and segregated from the stock in trade.)

sales laws of Arkansas,[14] California,[15] Louisiana,[16] and Oklahoma[17] contain express provisions covering chattel mortgages. The New York[18] and Michigan[19] statutes provide that chattel mortgages on stocks of goods or merchandise shall be treated in the same manner as sales in bulk. The bulk sales law of Maine,[20] on the other hand, provides specifically that it shall not apply to "mortgages made in good faith for the purpose of security only." More often, however, the legislature has not mentioned chattel mortgages specifically in the bulk sales law, but has left the answer to the courts. If we count cases, the numerical weight of authority holds that, unless specifically provided, a bulk sales law does not cover a chattel mortgage of a stock of goods, wares and merchandise (and perhaps fixtures).[21] However, as indicated in the footnote, there is some auth-

[14] ARK. DIG. STAT. (Crawford & Moses, Supp. 1927, §§ 4870-4872 as amended, Acts 1929, No. 23.

[15] CAL. CIV. CODE, (Ragland, 1927) § 3440.

[16] Acts of La. 1926, 464.

[17] OKLA. COMP. STAT. (Burr, 1921) § 6029.

[18] Lien Law, § 230a (1922).

[19] Public Acts 1931, No. 198.

[20] ME. REV. STAT. (1916) c. 114, § 7.

[21] *In re* Gary, 281 Fed. 218 (S. D. Tex. 1921) (A federal court in Texas refused to follow the Texas Court of Civil Appeals in construing the Texas statute, and held a chattel mortgage of fixtures to be neither a "transfer" nor a "sale" within the bulk sales law, especially in view of another statute which declared fraudulent and void chattel mortgage on goods exposed for sale by the mortgagor); *In re* Martin, 283 Fed. 833 (E. D. Tex. 1923); *In re* George Seton Thompson Co., 297 Fed. 934 (C. C. A. 7th, 1924) (construing Illinois statute); U. S. v. Lankford, 3 F. (2d) 52 (E. D. Va. 1924) (construing Virginia statute); Farrow v. Farrow, 136 Ark. 140, 206 S. W. 134 (1918) (chattel mortgage on goods and fixtures to secure purchase price held not within the Arkansas statute); Avery & Sons v. Carter, 18 Ga. App. 527, 89 S. E. 105 (1916); Wright v. Cline, 27 Ga. App. 129, 107 S. E. 593 (1921) (Georgia statute,—"any sale or transfer" held to apply only to absolute sales, so a deed to secure the payment of a debt, although purporting to pass title to the buyer, is not within the statute); Bank of La Grange v. Rutland 27 Ga. App. 442, 108 S. E. 821 (1921) (bill of sale made to secure a debt, being less than an absolute sale, held not within Georgia statute); Talty v. Schoenholz, 323 Ill. 232, 154 N. E. 139 (1926), reversing 238 Ill. App. 635 (1925); Slow v. Ohio Valley Roofing Co., 198 Ind. 190, 152 N. E. 820 (1926) (conveyance to trustee for benefit of certain creditors, as security for pre-existing debts, with provisions for redemption on payment of debts secured and for sale of property on demand of creditors, such as are usually found in chattel mortgages, held not within the Indiana Bulk Sales Act which uses the phrase "sale, arnsfer, or assignment"); See Des Moines Packing Co. v. Uncaphor, 174 Iowa 39, 156 N. W. 171 (1916); Faeth Co. v. Bressie, 128 Kan. 425, 264 Pac. 1077 (1928); Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959 (1906) (statute held not to apply where a mortgage on a stock of dry goods was given *bona fide* for value consideration, on the theory that the object of the Massachusetts Bulk Sales Ace was to protect creditors against fraudulent sales); Hannah & Hogg v. Richter Brewing Co., 149 Mich. 220, 112 N. W. 713, 12 L. R. A. (N. S.) 178 (1907) (chattel mortgage on stock of liquor business, given to secure debt for goods previously furnished, held not within Michigan

ority to the contrary.[22] The reason sometimes advanced for this latter view — which expresses the attitude of many credit men — is that if the owner of a stock of merchandise may mortgage it without notifying his other creditors (and thus place the mortgagee in the superior position of a creditor whose claim is secured by the

Bulk Sales Law because in Michigan a chattel mortgage does not pass title to property); Symons Bros.. & Co. v. Brink, 187 Mich. 43, 153 N. W. 359 (1915); American Steel & Wire Co. v. Dedrick, 196 Mich. 731, 163 N. W. 18 (1917); Michigan Cent. R. Co. v. Morgan, 227 Mich, 491, 198 N. W. 967 (1924); Farmers' Co-op. Co. v. Bank of Leeton, 319 Mo. 548, 4 S. W. (2d) 1068 (1928) (holding *bona fide* chattel mortgage on stock of merchandise and fixtures to secure valid debt not a "sale, trade or other disposition"; also holding mortgagee taking possession under foreclosure proceedings not to constitute a "disposition" and overruling on this point several decisions of the Missouri Court of Appeals). Lee v. Gillen & Boney, 90 Neb. 730, 134 N. W. 278 (1912); Appal Mercantile Co. v. Kirtland, 105 Neb. 494, 181 N. W. 151 (1920) (chattel mortgage given *bona fide* for money advanced by mortgagee to enable mortgagor to continue business held not a "sale, trade, or other disposition" within Nebraska statute, on theory that a chattel mortgage merely creates a lien and does not pass title); Schwartz v. King Realty, *etc.*, Co., *supra* n. 6 (holding it immaterial whether sale was an ordinary foreclosure of the chattel mortgage, or was by the joint action of mortgagor and mortgagee); Noble v. Ft. Smith Wholesale Grocery Co., 34 Okla. 662, 127 Pac. 14, 46 L. R. A. (N. S.) 455 (1911) (chattel mortgage on stock held to create lien, not to pass title, so such mortgage constituted no "sale, exchange or assignment" within the Oklahoma statute); Aristo Hosiery Co. v. Ramsbottom 46 R. I. 505, 129 Atl. 503 (1925) (chattel mortgage on stock in trade given as security for antecedent debt, held not a "sale, exchange, or assignment," although Rhode Island adopts theory that title passes to the mortgagee on execution of the mortgage, with a right of redemption in the mortgagor); Daniels v. Pacific Brewing & Malting Co., 86 Wash. 416, 150 Pac. 609 (1915).

[22] *In re* Handy-Andy Stores of La., 51 F. (2d) 98 (D. La. 1931) (but see language of Acts of La. 1926, 464); Cohen v. Hodes, 54 F. (2d) 680 (D. C. N. Y. 1932) (decision under N. Y. Lien Law, § 230a, 1922); Linn County Bank v. Davis, 103 Kan. 672, 175 Pac. 972, 9 A. L. R. 468 (1918) (title to property covered by a chattel mortgage passes by execution thereof in Kansas and the court held a chattel mortgage, at least when accompanied by a transfer of possession to the mortgagee, to be a "sale or disposal" within the Kansas statute); C. B. Norton Jewelry Co. v. Maddock, 115 Kan. 108, 222 Pac. 113 (1924), affirmed on reargument in 115 Kan. 574, 223 Pac. 816 (1924) (held pledge of merchandise to a creditor as security for payment of a pre-existing debt to be a "disposal" within Kansas statute); Mills v. Sullivan, 222 Mass. 587, 111 N. E. 605 (1916) (Massachusetts follows the majority rule. See Wasserman v. McDonnel, *supra* n. 21. But where a chattel mortgage of a stock in trade was followed immediately by a release of the equity of redemption the court held there was such a conveyance of legal title as to bring it within the Massachusetts Bulk Sales Act); McHenry v. Heiderich, 134 Misc. 546, 236 N. Y. Sup. p. 1 (1929) (decision under N. Y. Lien Law, § 230a, (1922); Waldrep v. Exchange State Bank, 81 Okla. 162, 197 Pac. 509, 14 A. L. R. 747 (1921) (Oklahoma statute, prior to amendment specifically including chattel mortgages, held to invalidate a chattel mortgage on a stock of merchandise where the facts indicated that the real purpose of parties was to make a transfer and pass title rather than to effect security); Beene v. National Liquor Co., 198 S. W. 596 (Tex. Civ. App. 1917) (chattel mortgage held a "transfer or sale" within Texas statute and therefore void because of lack of notice to creditors, although in Texas a chattel mortgage does not pass title to the mortgagee); Texas Bank & Trust Co. v. Teich, 283 S. W. 552 (Tex. Civ. App. 1926).

very merchandise to which the other creditors are looking for the payment of their claims) whatever protection is afforded by the bulk sales statutes is materially lessened.[23]

The foregoing approach—which obviously finds justification for the result reached in reasons of policy—unfortunately does not appeal to many courts. The following language from the opinion of the United States District Court for the Eastern District of Virginia in *United States* v. *Lankford*,[24] a case involving the Virginia statute,[25] is more typical of the orthodox approach:

> "The difference between the cases that hold that the act applies to chattel mortgages and those that hold that it does not apply appears to rest upon the question as to whether or not title passes to the goods conveyed under the mortgage or trust. In the cases holding that title remains in the mortgagor, it has been generally held that a chattel mortgage is not a 'sale, transfer or assignment.' In those states in which it has been held that title does pass by the deed of trust or mortgage, the act has been held to apply."

Thus, the solution to the problem of whether a chattel mortgage on a stock of groceries or hardware violates the bulk sales law of a particular jurisdiction is declared to lie in the age-old "title" or "lien" concept of real property mortgage law. However, the results reached in the bulk sales cases are not always consistent with the theory.[26] Texas, for example, is classified by the authorities on mortgage law as a "lien" state.[27] Yet the Texas Court of Civil Appeals had no difficulty in determining that a chattel mortgage given on a stock of merchandise passed sufficient "interest" in the property to fall within the Texas statute.[28] Rhode Island, on the other hand, is listed as a "title state."[29] But a chattel mortgage given on a stock in trade to secure an existing indebtedness was held not to violate the Rhode Island bulk sales law.[30]

---

[23] Beene v. National Liquor Co., *supra* n. 22.

[24] *Supra* n. 21, at 54.

[25] VA. CODE (Michie, 1930) § 5187.

[26] See Sturges and Clark, *Legal Theory and Real Property Mortgages* (1928) 37 YALE L. J. 691.

[27] 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 163, n. n. 1, 2; 1 JONES, MORTGAGES (7th ed. 1915) § 58.

[28] Beene v. National Liquor Co., *supra* n. 22.

[29] *Supra* n. 27.

[30] Aristo Hosiery Co. v. Ramsbottom, *supra* n. 21, at 508. The court said: "It is true that under the theory of chattel mortgages which has been adopted in this state the legal title to the property passes by mortgage given, with the right to redemption in the mortgagor. There is thus a limited transfer effected, but the substance of the transaction is not different from that in the

It is our belief that the solution to the problem of the chattel mortgage of a stock of goods—where a solution is not provided by statute—lies in abandoning real property mortgage theories and in substituting therefor a frank facing of facts. If conditions in the business community are such that dishonest debtors are defeating the purpose of the bulk sales law by giving chattel mortgages instead of bills of sale on their stocks of goods, then certainly the courts should come to the rescue of the general creditors, as they already have done in Kansas[31] and Texas.[32] Certainly an approach of this kind which seeks to make the statute cover the very mischief which it was intended to remedy is socially more desirable than an approach which reaches its result by deducing it from certain none-too-infallible concepts of real property mortgage law.[33]

Assignment for the Benefit of Creditors

Another interesting question concerning business transactions within the statute is the relation of bulk sales laws to general assignments for the benefit of creditors. The statutes or court decisions in most of the states expressly exempt from the operation of the bulk sales laws such general assignments; also sales by executors, administrators, receivers, trustees in bankruptcy, and sales under judicial process.[34] The South Dakota statute, on the other hand, expressly includes assignors in trust and assignees in

jurisdiction where the so-called 'lien' theory of mortgage prevails. Under either the 'title' or 'lien' theory, a mortgage is the giving of security and is not an absolute and unconditional transfer of property, and it is generally held under similar statutes in other jurisdictions that chattel mortgages are not included in 'sales in bulk' acts.''

[31] See Kansas cases cited *supra* n. 22.

[32] See Texas cases cited *supra* n. 22, particularly Beene v. National Liquor Co.

[33] See Sturges and Clark, *op. cit. supra* n. 26.

[34] The West Virginia statute provides that ''sellers and purchasers . . . . shall include corporations, associations, copartnerships and individuals, but nothing contained in this article shall apply to sales by executors, administrators, receivers assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any one acting under judicial process.'' W. VA. REV. CODE (1931) c. 40, art. 2, § 5.

The following decisions hold that assignments for the benefit of creditors are not within the purview of bulk sales statutes. Des Moines Packing Co. v. Uncaphor, *supra* n. 21; Cardiff Plaster Co. v. Hales Coal, *etc.*, Co., 239 Ill. App. 16 (1926), discussed in (1926) 20 ILL. L. REV. 691; Turner v. Dress Hardware & Furniture Co., 207 Mo. App. 567, 227 S. W. 1085 (1921); Eldredge Brewing Co. v. Cocheco Bottling Co., 79 N. H. 41, 104 Atl. 453 (1918); Kell Milling Co. v. Wooten Grocery Co., 195 S. W. 342 (Tex. Civ. App. 1917); McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53 (1906). See Stovall Co. v. Shepherd Co., 10 Ga. App. 498 (1912).

trust within the definitions of the words "sellers" and "purchasers."[35]

The reasons behind the rule which declares the general assignment to be outside the scope of the bulk sales laws are well summarized in the following language by a writer in the Illinois Law Review:[36]

> "An assignment for the benefit of creditors is a very different thing from an 'assignment', as we ordinarily think of that term. By an assignment for the benefit of creditors, all of the debtor's assets are transferred to a trustee to be held in trust for all of the assignor's creditors. No consideration need, nor does it ordinarily, pass from the trustee to the assignor. The trustee does not hold the property for himself, but rather in a fiduciary capacity for all his creditors. In effect, the debtor has given his property to his creditors and the transaction is akin to the concept of a payment. There is nothing in such a transaction which can possibly be harmful to the creditors; instead it is most highly beneficial, and since we have seen that the purpose of the Act was to protect the creditors from such a disposition of the debtor's assets as would place such assets beyond the creditors' reach, therefore, it is clear that the purpose of the Act cannot possibly be held to include assignments for the benefit of creditors."

The foregoing considerations assume, of course, that the assignment is made honestly and that the assignee will administer the estate in an impartial manner for the benefit of all the creditors. Under such conditions it is desirable that the assignee be hampered as little as possible by legal rules in order that the liquidation may proceed as rapidly and as economically as sound business policy dictates. However, even some of the managers of the adjustment bureaus affiliated with the National Association of Credit Men (who as a class generally desire freedom from legal restrictions which retard the liquidating process) sometimes state frankly that they believe certain other considerations make it desirable that the bulk sales laws should cover assignments for the benefit of creditors.

---

[35] S. D. COMP. LAWS (1929) § 920. The decision of Traeger v. National Surety Co., 212 Ill. App. 267 (1918) and several other earlier Illinois Appelate decisions held that a general assignment of his stock and fixtures for the benfit of his creditors made by a merchant was a sale within the meaning of the Illinois Bulk Sales Law, ILL. REV. STAT. (Smith & Hurd, 1929) § 2566. See Note (1926) 20 ILL. L. REV. 691. See also Kaye v. Jacobs, 10 Pac. (2d) 186 (Calif. App. 1932).

[36] (1926) 21 ILL. L. REV. 153, 155.

At least such was the attitude of Mr. William H. Whitney, who for several years was manager of the adjustment bureau of the North Jersey Association of Credit Men in Newark, N. J.[37] Some six years ago a "ring" of unscrupulous assignees was operating in Newark. Common law assignments of a debtor's property were taken—often over a week-end—and the property was sold within a few hours thereafter to a buyer who had been procured before the assignment was made. The policy of the "ring" was to dispose of the assets quickly and with as little publicity as possible. At the same time the "ring" members usually managed to keep their operations technically "within the law". The general creditors ordinarily received only nominal dividends from these assignments "for the benefit of creditors". However, the trouble and expense involved in attacking the assignment on the grounds of fraud, or in throwing the debtor's estate into bankruptcy usually deterred the creditors from availing themselves of their legal remedies.

Obviously, a fraudulent assignment for the benefit of creditors may be attacked, as may any other transfer of debtor's property. However, the average credit man usually is not satisfied with a "legal remedy" which he may put in motion after a "legal right" has been violated. "What the credit man desires most is not a legal remedy to be administered subsequent to the sale of the debtor's assets, but notice *in advance* of the proposed transfer, such as a bulk sales statute provides."[38] Therefore, from this viewpoint, notice of a proposed assignment for the benefit of creditors might prove quite advantageous—at least from a business standpoint. Of course there is always the practical consideration that one who contemplates taking a fraudulent general assignment will never risk notifying the debtor's creditors, regardless of what the statute stipulates. Nevertheless, if the bulk sales law states flatly that a general assignment made in violation of its provisions transfers no property interest to the assignee or his transferee (*i. e.*, the assignment is absolutely void),[39] such a provision may at least serve to hold down the number of possible fraudulent general assignments.

[37] Mr. Whitney's attitude in this regard was expressed in a conversation with one of the authors at Newark in December, 1927.

[38] Billig, *op. cit. supra* n. 1, at 101.

[39] The Texas Court of Civil Appeals reached this result where the deed of assignment preferred some creditors to the exclusion of others. Terrell Grain and Mercantile Co. v. Young, 152 S. W. 671 (Tex. Civ. App. 1912). See TEX. COMPLETE STAT. (1928) art. 4003; Kell Milling Co. v. Wooten Grocery Co., *supra* n. 34.

We do not desire to state without qualification that we believe our bulk sales statutes should be amended to include assignments for the benefit of creditors. The trend of statute law and court decision clearly is against such a position. We do, however, desire to point out the fact that the inclusion of general assignments within the operations of these laws might—in certain cases involving fraudulent assignments — prove quite useful to the business community.

Transfers To Corporations And Partnerships

The final section of this paper will consider the question of whether the bulk sales law must be complied with when a merchant transfers his stock and fixtures to a corporation or a partnership which has been organized to take over the business. The courts are not in harmony as to the answer. In both Maryland[40] and Texas[41] it has been held that the transfer of the assets of a partnership to a corporation organized by the members of the partnership was invalid because the partnership creditors had not been notified as required by the bulk sales law. In West Virginia case of *Marlow v. Ringer*[42] the Supreme Court of Appeals held that the transfer by Ringer, a retail grocery merchant, of a half interest in his business and stock of goods to Marlow, in consideration of Marlow's placing in the store a quantity of goods equal in value to the goods then owned by Ringer, although the parties intended to form a partnership to carry on the business at the same location, constituted a "sale of merchandise in bulk", within the purview of the bulk sales law, "otherwise than in ordinary course of trade and in the regular and usual prosecution of the seller's business", and, since the provisions of the bulk sales law had not been complied with, the transfer was void *in toto* as against Ringer's creditors.

In reaching this result the court said, per Lynch, J.:

> "The obvious effect of the transaction was to transfer to Marlow a one half interest in the stock as it was at that time, and to Ringer a like share of the goods purchased by Marlow. This realinement of interest, of course, did not work any impairment or diminution in the value of the property that could be subjected to the payment of Ringer's liabilities; indeed, apart from the statute, it may be said that the purchase improved the condition of the concern to liquidate the

[40] Sakelos v. Hutchinson Bros., 129 Md. 300, 99 Atl. 357 (1916).
[41] Smith-Calhoun Rubber Co. v. McGhee Rubber Co., 235 S. W. 321 (Tex. Civ. App. 1921).
[42] 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917D 619 (1917).

liabilities of the partners, whether joint or several, and certainly to liquidate the liabilities of Ringer. But, whatever may be the alteration in the status of the joint or individual liabilities of the partners, the statute expressly condemns as fraudulent and void as to creditors of the seller, except upon the conditions prescribed, the sale in bulk of any part of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business. An interpretation in the effectuation of a release of the plaintiff from the embarrassment into which his ill advised zeal has led him, however honest he may have been, would do violence to the plain language of the statute."[43]

On the other hand there are several decisions which declare that, in the absence of actual fraud, a transfer in bulk to a corporation (and probably to a partnership) formed by the seller to take over the business, is not within the purview of the bulk sales statutes. In *McLean v. Miller Robinson Company*,[44] a federal case, the debtor, who had for a number of years conducted a lumber business, procured a Delaware charter and, on January 6, 1931, transferred all the assets of the business to the corporation in exchange for its capital stock. Upon the transfer, the corporation assumed all the existing indebtedness of the business. The corporation went into receivership on January 12, 1931. Thereafter a judgment creditor of the debtor filed a petition alleging that the provisions of the Pennsylvania Bulk Sales Act had not been complied with and asking leave of court to collect the judgment by execution against the assets which had been transferred. In dismissing the petition, the court, per Kirkpatrick, J., said:

"There is no suggestion of actual fraud. The transaction did not reduce the value of the assets available to creditors, but merely changed their form. Instead of the tangible property, the creditors could proceed against the stock which was indisputably of equal value."[45]

In view of the fact that the corporation went into receivership only six days after the transfer of the assets (one wonders

[43] *Ibid.*, 573, 574.
[44] 55 F. (2d) 232 (E. D. Pa. 1931).
[45] *Ibid.*, 233.
[46] There are several decisions in accord. Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229 (1906). The Minnesota law provided that a sale in bulk made without complying with the bulk sales statute would be "presumed to be fraudulent and void". A transfer in bulk of the stock of a partnership to a corporation organized to take over the business was held to be *bona fide* and not within the statute. Maskell v. Spokane Cycle & Auto Supply Co., 100 Wash. 16, 170 Pac. 350, L. R. A. 1918 C (1918); Norris v. Anderson, 134 Wash. 403, 235 Pac. 966 (1925).

whether it was a consent receivership) there may be some question as to the lack of fraudulent elements in this particular case. However, the test employed by the court, whether there was fraud in fact, in determining whether a transfer of this kind should fall within the scope of the bulk sales law certainly shows a business-like approach to the problem which is utterly lacking in the reasoning of *Marlow v. Ringer*.[47] "Where actual fraud is present in a transfer in bulk from an individual to a corporation of a stock of merchandise, there is no question but that the transaction comes within the Bulk Sales Laws of those states which describe a sale in bulk without compliance with the statute as 'void'; and also within the Bulk Sales Laws of those states which provide that such transfers shall be 'presumed to be fraudulent and void'."[48] Conversely where a transaction of this kind contains no fraudulent elements whatever, it certainly does not seem to fall within the mischief which the bulk sales statute sought to remedy.

Conclusion

Several other problems which have arisen in the interpretation of bulk sales laws will be considered in a later article. These will include (1) the meaning of such words or phrases as "void", "fraudulent and void" or "presumed to be fraudulent and void" when used in a bulk sales statute; (2) the relative legal positions of the purchaser and the creditors of the seller; (3) the remedies open to the creditors when the debtor sells out in bulk without complying with the terms of the statute.

---

[47] *Supra* n. 42.

[48] CREDIT MANUAL OF COMMERCIAL LAWS (1933) 342. See West Shore Furniture Co. v. Murphy, 141 N. Y. Supp. 835 (1913).